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USE OF THE DIPLOMA PRIVILEGE IN THE UNITED STATES

Thomas W. Goldman*

INTRODUCTION

At the present time more persons are graduating from the nation's law schools than ever before in history. Members of the legal profession are therefore justly concerned with requirements for admission to the practice of law. With the number of members of the profession increasing at such a rapid pace, the problem of ensuring the competency of those applying for admission comes squarely into focus.

Amid the increasing complexity and stringency of statutes relating to bar examinations and the growing acceptance of the Multi-State Bar Examination, there are four jurisdictions—Mississippi, Montana, West Virginia, and Wisconsin—that administer no bar examination whatever to those who produce a diploma from an approved school within the state.¹

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1. MISS. CODE ANN. § 73-3-33 (1972). Diploma from the university entitles to admission.

Any person holding a diploma granted by the University of Mississippi conferring upon him the degree of bachelor of laws, and in addition thereto, possessing all of the qualifications hereinbefore required, in order to be eligible to the examination for admission to the bar, and desiring to obtain a license to practice law in courts of this state, shall file and present an ex parte petition, under oath, to the chancery court or chancellor of the county of his residence, or of the county in which petitioner intends to practice, or to the chancery court or chancellor of Lafayette County, Mississippi, alleging such desire and clearly setting forth the facts and qualifications above mentioned with a copy of said diploma attached thereto. And the court or chancellor, upon hearing of said petition, in term time or in vacation, shall carefully inquire into the moral character of the petitioner, his said other qualifications, examine original of said diploma, and if fully satisfied that the petitioner is of good moral character and otherwise qualified, shall not examine the petitioner as to his legal qualifications, but shall have entered on the minutes of said court an order granting to the petitioner a license to practice law in all of the courts of this state, both of law and equity, upon petitioner paying all costs in said cause, and taking oath prescribed by law.

MONT. REV. CODES ANN. § 93-2002 (1947). Qualifications, examination and admis-

It is hoped that an examination of the origin of the diploma privilege, the use and popularity it enjoyed for a while, and its subsequent

sion.

Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of good moral character, and a certificate of one or more reputable counselors at law that he has been engaged in the study of law for two successive years prior to the making of such application, and undergo a strict examination as to his qualifications by any one or more of the justices of the supreme court. The form and manner of the examination shall be as the justices may, from time to time, determine; provided, however, that a diploma from the department of law of Montana at Missoula, or evidence of having completed the course in law of three years of said department, shall entitle the holder to a license to practice law in all the courts of this state, subject to the right of the chief justice of the supreme court of the state to order an examination as in ordinary cases of applicants without such diploma or evidence.

W. VA. CODE ANN. § 30-2-1 (Michie Supp. 1972). Certificate of good moral character; examination of applicants for license; licenses; diploma privilege of graduates of West Virginia college of law.

Any person desiring to obtain a license to practice law in the courts of this State shall appear before the circuit court of the county in which he has resided for the last preceding year and prove to the satisfaction of such court, or to the satisfaction of a committee of three attorneys practicing before such court, appointed by the court, that he is a person of good moral character, that he is eighteen years of age, and that he has resided in such county for one year next preceding the date of his appearance; and upon the presentation of such proof, the court shall enter an order on its record accordingly. The supreme court of appeals shall prescribe and publish rules and regulations for the examination of all applicants for admission to practice law, which shall include the period of study and degree of preparation required of applicants previous to being admitted, as well as the method of examinations, whether by the court or otherwise. And the supreme court of appeals may, upon the production of a duly certified copy of the order of the circuit court, hereinbefore mentioned, and upon being satisfied that the applicant has shown, upon an examination conducted in accordance with such rules and regulations, that he is qualified to practice law in the courts of this State, and upon being further satisfied that such rules and regulations have been complied with in all respects, grant such applicant a license to practice law in the courts of this State, and such license shall show upon its face that all the provisions of this section and of the said rules have been complied with: Provided, that any person who shall produce a duly certified copy of such order of the circuit court, and also a diploma of graduation from the college of law of West Virginia University, shall, upon presentation thereof in any of the courts of this State, be entitled to practice in any and all courts of this State, and the order so admitting him shall state the facts pertaining to the same.

WIS. STAT. ANN. § 256.28(1) (1971). Admission to the bar.

No person shall be admitted or licensed to practice law in this state, including appearing before any court, except in the following manner:

(1) Admission on law diploma, list of law schools. (a) Every person 21 years of age or over and of good moral character who is a citizen of the United States, a resident of this state and a graduate of a law school in this state which law school at the time of his graduation was approved by the American Bar Association, as shown by the record of the clerk of the supreme court, and who has met the requirements of subsection (1)(b) shall be admitted to practice law in this state by the supreme court and, when such court is not in session, by one of the justices thereof, by an order signed by such justice and filed with the clerk of said court. (b) To be admitted on the diploma privilege, every applicant must present to the clerk of the supreme court his diploma and a certificate of the law school at which he completed his formal law studies, showing the courses completed and the semester credits earned and stating that according to the official academic records of such school the applicant has satisfactorily

decline to its present form and status will promote an understanding of the privilege and its relation to the present-day needs of the legal profession. This should also provide information as to the advisability of its continued use, possible revival, or complete discontinuation.

ORIGIN AND HISTORICAL DEVELOPMENT

Prior to 1870

The diploma privilege originated when legal education was in a decline. Standards of admission to law schools, standards for performance during law school, and standards for admission to the bar were low.² A system of written examinations for normal course study by law schools was not implemented for three decades after the first use of the diploma privilege,³ and between the years 1800 and 1860 the proportion of jurisdictions in the United States requiring preparatory

completed at least the minimum of legal studies required for the first degree in law and the total semester hours were not less than 84; and such studies included not less than 60 semester hours of accredited study, satisfactorily completed in regular courses having as their primary and direct subject matters the study of rules and principles of substantive and procedural law as they may arise in the courts and the administrative agencies of the United States and this state in the areas generally known as: Administrative Law, Commercial Transactions, Conflict of Laws, Constitutional Law, Contracts, Corporations, Creditors' Rights, Criminal Law and Procedure, Damages, Domestic Relations, Equity, Evidence, Future Interests, Insurance, Jurisdiction of Courts, Labor Law, Ethics and Legal Responsibility of the Profession, Partnership, Personal Property, Pleading and Practice, Public Utilities, Quasi-Contracts, Real Property, Taxation, Torts, Trade Regulation, Trusts, and Wills and Estates. There shall be included in such minimum not less than 30 semester hours covering the following subject matters: Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Jurisdiction of Courts, Ethics and Legal Responsibilities of the Legal Profession, Pleading and Practice, Real Property, Torts, Wills and Estates. These requirements may be satisfied by combinations of the curricular courses, and the dean of each law school in Wisconsin shall file with the clerk of the supreme court upon its request a certified statement setting forth the courses taught in his law school which are accredited for a first degree in law and the percentage of the time devoted in each course to the subject matter of the areas of law required by this rule for eligibility to admission on the diploma privilege. In addition to these requirements a law school may require other courses or practical training, for which credit toward a degree may or may not be given, as a prerequisite to its certification of eligibility for admission on the diploma privilege.

(c) The clerk of the supreme court shall compile a record of all law schools, which are approved by the American Bar Association, with the date of such approval and those which are not approved; and such record so compiled shall constitute an official record of the supreme court, and proof of the fact that the law schools therein stated as approved by the American Bar Association were so approved at the times therein stated.

2. A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW, Bull. No. 15 of the Carnegie Foundation for the Advancement of Teaching 356 (1921) [hereinafter cited as REED]. Hansen, *The Early History of the College of Law, State University of Iowa: 1865-1884*, 30 IOWA L. REV. 31 (1944).

3. *Id.*

periods for admission to the bar dropped from seventy-five per cent to twenty-five per cent.⁴

After 1840 a majority of the schools in the United States operated in jurisdictions without any preparatory education requirements for admission to the bar. Some of these states did require bar examinations but this did not necessarily encourage would-be lawyers to attend law schools. The schools sometimes felt that the requirement of a bar examination placed them:

[I]n the unfortunate predicament that if, as was usually the case, the examination did not amount to anything, applicants could pass it without attending the school; while if, on the other hand, the courts, manned by office-trained judges, decided that since this was the only barrier upon admission it ought to be a serious test, the examination might be one that the school graduates were not fitted by their training to pass.⁵

As a solution to this predicament, beginning in Virginia in 1842, William and Mary College and the University of Virginia sought and obtained a legislative enactment allowing admission of their graduates without examination.⁶

At that time the law schools needed the diploma privilege as an incentive to attract students. Proponents also believed that exemption from the bar examination would relieve students of the fear or anxiety produced from anticipating the examination, and would eliminate a certain amount of inconvenience and expense. Perhaps most importantly, the prominence of the schools would be raised in the eyes of the students and the public due to the newly acquired stamp of approval from the state itself.⁷

Other favorable attitudes toward adoption of the privilege were the result of a dissatisfaction with the bar examinations then in existence. The examinations were criticized on the one hand for failure to deal with general principles of law and for concentration on details of local practice, and on the other hand for being too broad in scope.⁸

4. REED, *supra* note 2.

5. *Id.* at 248-49.

6. *Id.* at 249.

7. *Id.* at 249.

8. M. KIRKWOOD, *Requirements for Admission to Practice Law*, in BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 102-03 (1952) [hereinafter cited as KIRKWOOD]. In Louisiana dissatisfaction was due to a rigid form of examination which relied upon a list of textbooks that remained unchanged for 15 years. See REED, *supra* note 2, at 250.

Louisiana, Mississippi, Georgia, New York, Tennessee, Michigan, and Wisconsin followed Virginia in instituting the diploma privilege in the years between 1842 and 1870.⁹ The most prevalent form of statute limited the exemption from the bar examination to students graduating from schools within the state in which application was made for admission.¹⁰

Prior to the organization of the selective bar associations in the 1870's, the law schools became influential with the legislatures and the courts and were elevated to a level equal to or higher than other methods of legal training, and thus the diploma privilege became firmly implanted in the system of legal education.¹¹

1870-1917

The next twenty years witnessed a proliferation of the diploma privilege but also saw the germination of seeds of discontent that would lead to its decline. Encouraged by the trend established in recent years, the diploma privilege was adopted by the District of Columbia, Maryland, Connecticut, Kentucky, Iowa, Missouri, Pennsylvania, Illinois, Alabama, California, South Carolina, West Virginia, and Minnesota.¹²

Although the exemption of law school graduates from bar examinations was being generally accepted throughout the United States, the diploma privilege never enjoyed full support by the bar or even by those associated with the law schools, and ill feelings emerged. The standards of the profession began to improve as an increasing number of jurisdictions returned to requiring preparatory education for admission to the bar.¹³ Bar associations were being organized and were becoming effective in the shaping of policy in the field of legal

9. REED, *supra* note 2, at 252 n.1. "The old University of Chicago law school (present law department of Northwestern University) was the first school, in a state where a period of law study was prescribed, to secure exemption of its graduates from the examination." The exemption was in use between 1863 and 1865. REED, *supra* note 2, at 256.

10. The Supreme Court of the State of Oregon adopted a rule which "provided that the diploma of any school that would admit to practice in its own state would also admit to practice there." REED, *supra* note 2, at 253.

11. REED, *supra* note 2, at 406-07.

12. *Id.* at 265-66 n.4. Additional schools were added in two states, Georgia and Tennessee, that had already provided for an exemption from the bar examination. Only New York discontinued usage of the privilege during this period. *Id.* at 265.

13. Hansen, *supra* note 3, at 33. By 1890, the percentage would be 50% and in 1917 the percentage would return to 75%, the same as in the year 1800.

education due to a new sense of responsibility felt by their members.¹⁴ As a part of that policy, the bar associations believed that effective bar examinations were essential for the improvement of the profession.¹⁵

Further signs of dissatisfaction surfaced when the American Bar Association by-passed the opportunity to publicly support the diploma privilege by resolution in 1881,¹⁶ and when some of the very schools that had originally supported the privilege while its benefits were exclusive to them, sought its abolition because it was extended to other schools.¹⁷

Opposition continued to grow and it was not long before the American Bar Association formally denounced the privilege.¹⁸ A few years later the Association of American Law Schools, at its first regular meeting, passed a resolution condemning the admission of persons without examination.¹⁹ It was said that bar admissions were too important to leave to anyone other than the state,²⁰ and that in the absence of an impartial test the schools had a tendency to relax instruction and standards.²¹

1917-Present

By 1917 it was obvious that the legislatures had been affected by the growing expression of a desire to require examination for everyone, and the graduates of only twenty-two schools (or sixteen per cent of the total number of law schools) were allowed the exemption on the production of a diploma. Only fifteen states still recognized the

14. REED, *supra* note 2, at 264.

15. *Id.*

16. *Id.* at 266.

17. KIRKWOOD, *supra* note 8, at 103. For an example of a court's reaction to the desire of a school in Florida to have graduates admitted under the diploma privilege see *In re Application of the University of Jacksonville*, 130 Fla. 588, 178 So. 149 (1938).

18. REED, *supra* note 2, at 266. The first action by the American Bar Association was in 1892 but when it formulated the original standard requirements in 1921 the diploma privilege was denounced. A. REED, STANDARDS RECOMMENDED BY ASSOCIATIONS FROM REVIEW OF LEGAL EDUCATION IN THE UNITED STATES AND CANADA, 1926 AND 1927. See ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR THE APPROVAL OF LAW SCHOOLS § 102 (1973) for a current provision.

19. A. REED, STANDARDS RECOMMENDED BY ASSOCIATIONS FROM REVIEW OF LEGAL EDUCATION IN THE UNITED STATES AND CANADA, 1926 AND 1927.

20. REED, *supra* note 2, at 266.

21. Crotty, *Standards for Bar Examiners: The Time has Come for Substantial Reform*, 41 A.B.A.J. 117-18 (1955); REED, *supra* note 2, at 267.

privilege.²² California and Minnesota, each of which had several schools operating under the privilege, abolished it;²³ and in 1937, Texas, which had extended the exemption not only to local schools, but to graduates of schools out of state, also changed the law to require examination. Georgia, Louisiana, Michigan, Nebraska, Utah, and Washington also abolished the exemption during this period so that by 1948 only thirteen schools in nine states retained the privilege.²⁴

The popularity of the diploma privilege steadily declined as Florida, Arkansas, Alabama, South Carolina, and South Dakota reverted to the use of bar examinations as a requisite for admission to the bar. Today only Mississippi, Montana, West Virginia, and Wisconsin honor the diploma privilege.²⁵

THE EXISTING STATUTES

All graduates from designated law schools in these states are permitted to enter the practice of law without further examination as to legal education, but certain distinctions exist among the diploma privilege statutes.²⁶

The statutes in Mississippi and West Virginia require merely the production of a diploma from certain schools in order to be admitted to the bar.²⁷ The law in Montana grants the diploma privilege only to graduates of the University of Montana but specifically reserves for the chief justice of the supreme court the right to order an examination even of those graduates.²⁸ As a matter of practical application, however, the Montana reservation is intended to affect a very limited number. Wisconsin has the most restrictive diploma privilege statute ever written. For admission, each applicant must have completed a certain number of semester hours, of which a minimum number must be in certain substantive and procedural law courses. It is further necessary

22. REED, *supra* note 2, at 266. States adopting statutes allowing an exemption from the bar examination did not in every instance make the exemption applicable to every law school within the state.

23. *Id.*

24. BROWN, *LAWYERS AND THE PROMOTION OF JUSTICE* 115 (1938).

25. Only those graduates of schools designated by statute or approved by statute are admitted under the diploma privilege. Other graduates, as in the case of the Jackson School of Law located in Jackson, Mississippi, are required to pass an examination.

26. MISS. CODE ANN. § 73-3-33 (1972); MONT. REV. CODES ANN. § 93-2002 (1947); W. VA. CODE ANN. § 30-2-1 (Michie Supp. 1972); WIS. STAT. ANN. § 256.28 (1) (1971).

27. MISS. CODE ANN. § 73-3-33 (1972); W. VA. CODE ANN. § 30-2-1 (Michie Supp. 1972). This refers to legal education qualifications only, as all four states impose standards for residence, oaths and moral fitness.

28. MONT. REV. CODES ANN. § 93-2002 (1947).

for the applicant to pass a minimum number of hours in specific subject matters.²⁹

There has been much debate over the years concerning the desirability of admission to the legal profession without examination. The states now applying this rule have withstood varying degrees of criticisms. Legislators in Mississippi and West Virginia have introduced legislation to bring about change, and in these states, as well as in Wisconsin, this has been a subject of conversation among lawyers for some time.³⁰ As recently as 1969 there was a judicial challenge that ironically resulted in the strongest defense of the privilege in recent history.³¹ Having expressed a desire to comment on the wisdom of the rule,³² the Supreme Court of Montana considered a case in which it was alleged that the statute constituted a denial of equal protection of the laws, "bad public policy", and was against the trend in the United States to discontinue the diploma privilege. The court upheld the statute, citing Metcalf, *A Survey on Admission to Practice Law in Montana*, to the effect that "The standards, both for prelegal and actual law study, are higher for graduates of Montana law school than for applicants to take the bar examination." Metcalf pointed out that graduation from the University required three years of law study but only "two years of study loosely supervised in a law office or self-study at night" were required to take the bar examination.

Relying on this same source, the court further noted that the law school is small and is the only one in the state, and thus the supreme court is able to maintain a close relationship with the faculty, students, and curriculum; and finally, that the expense of a bar examination system for everyone is prohibitive.³³

29. WIS. STAT. ANN. § 256.28(1) (1971).

30. Letter from George Van Zant, Secretary, Mississippi Board of Bar Admissions to Thomas W. Goldman, December 4, 1972; Letter from Virginia S. Lett, Secretary, State of West Virginia Board of Bar Examiners to Thomas W. Goldman, November 21, 1972; Letter from Marilyn Graves, Secretary for Clerk of Wisconsin Supreme Court to Thomas W. Goldman, November 17, 1972.

31. Goetz v. Harrison, 154 Mont. 274, 462 P.2d 891 (1969). In 1948 the Idaho State Legislature enacted a diploma privilege statute which was the next year held unconstitutional as a usurpation of judicial power. (This is the only diploma privilege statute enacted within the last 33 years.) See Application of Kaufman, 69 Idaho 297, 206 P.2d 528 (1949); See also Ex parte Steckler, 179 La. 410, 154 So. 41 (1934) where the court acting upon amicus curiae brief filed by the dean and faculty of the three law schools in Louisiana struck down a diploma privilege statute as being a judicial function. Accord, In re Day, 181 Ill. 73, 54 N.E. 646 (1899); In re Bledsoe, 186 Okla. 264, 97 P.2d 556 (1939).

32. Goetz v. Harrison, 153 Mont. 403, 457 P.2d 911 (1969).

33. Goetz v. Harrison, 154 Mont. 274, 462 P.2d 891 (1969). In expressing an

CONCLUSION

In weighing the factors relevant to the benefits or harms resulting from use of the diploma privilege, it is evident that a fundamental proposition underlying the privilege must first be considered. That is the theory that any person who graduates from law school, which has as its function the preparation of students for the profession, is and should be presumed to be competent for admission to the bar. This view was incorporated into statutory form and was recognized judicially in Wisconsin.³⁴ It is suggested that this presumption should be examined in relation to the overall goal of the bar regarding admissions and the function of the bar examination.

intention to maintain a watch on the school the opinion contained the following language: "Should the day come that our confidence in the law school at the University of Montana is shaken as to an individual or collectively, we may well choose to re-examine our rules." 154 Mont. at —, 462 P.2d at 896. The same attitude was expressed by the Legislature in Minnesota with the statement: "When, in the opinion of the court, such college shall have ceased to merit such approval, the court may revoke the same, and thereafter the diploma shall no longer have the effect above provided." Law of April 17, 1917, ch. 282, § 2, [1917] Minn. Laws 419 (Repealed).

34. Law of 1903, ch. 77, § 5260, S.D. Laws (Repealed); see *In re Admission of Certain Persons to the Bar*, 211 Wis. 337, 247 N.W. 877 (1933).